Filed 2/3/05 P. v. Bauwin CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. RICHARD BAUWIN, Defendant and Appellant.	B172149 (Los Angeles County Super. Ct. No. VA074791)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert J. Higa and Raul A. Sahagun, Judges. Affirmed.

Christopher Blake, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Lawrence M. Daniels and Erin M. Pitman, Deputy Attorneys General, for Plaintiff and Respondent.

Richard Bauwin was charged with four counts of committing a lewd act on a child under the age of 14, and one count of possessing a controlled substance, with allegations that Bauwin had suffered two prior drug convictions (one in 1992 and one in 1997) for which he served two prior prison terms. (Pen. Code, § 288, subd. (a), 1203.066, subd. (a)(8), 667.5, subd. (b); Health & Saf. Code, § 11377, subd. (a).) There were two trials, the first resulting in his conviction of the drug count and a hung jury on the other counts, the second resulting in Bauwin's conviction of the four sex counts. At his sentencing hearing, Bauwin (after waiving his rights) admitted both priors and the prior prison term allegations.[1] The trial court sentenced Bauwin to state prison for a term of 12 years (upper term of eight years on count 1, with consecutive two-year sentences for two of the other sex counts and concurrent terms on the remaining sex count and the drug count), and "stay[ed] the two one-year priors."

Bauwin appeals, contending the upper term sentence runs afoul of *Blakely* because the reasons stated by the trial court for this sentencing choice -- that Bauwin was on parole at the time of these offenses, and that the victim was "particularly vulnerable" -- are not based on facts found true by the jury.[2] Assuming error, Bauwin's admissions mean it was harmless.

---

[1] The record is replete with other admissions. When interviewed by the police at the time of his arrest, Bauwin admitted he was on parole, and a transcript of that taped interview was received in evidence at both trials. In support of a sentencing memorandum in which he implored the court to grant probation, Bauwin submitted a psychiatric evaluation that discussed his criminal record at some length, and also submitted a letter certifying that "inmate Richard Bauwin" had taken certain training classes while incarcerated. We have no doubts about Bauwin's criminal record or about the trial court's reliance on that record at the time of sentencing.

[2] We agree with those courts that have held that the forfeiture doctrine does not bar *Blakely* claims, and we therefore reject the Attorney General's contention that, because it was not

DISCUSSION

In *Blakely v. Washington* (2004) 542 U.S. ___ [124 S.Ct. 2531], the United States Supreme Court held that, "'[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" (*Id.* at p. 2536.) Although our Supreme Court is currently considering the question of whether *Blakely* precludes a trial court from making findings on aggravating facts in support of an upper term sentence (*People v. Towne,* review granted July 14, 2004, S125677; *People v. Black,* review granted July 28, 2004, S126182), we are of the view that where, as here, there are admitted prior convictions, *Blakely* means what it says. Because Bauwin admitted that he had suffered two prior convictions for which he served two prior prison terms, and because the trial court referred to these admitted facts at the time it imposed sentence, it is immaterial that the trial court referred to other factors when it selected the high term sentence. (See also *U.S. v. Booker* (Jan. 12, 2005 , Nos. 04-104, 04-105) ___ U.S. ___ [2005 U.S. Lexis 628].)

---

raised in the trial court, the *Blakely* issue was not preserved for appeal. (See *People v. Vaughn* (2004) 122 Cal.App.4th 1363, 1368-1369, review granted Dec. 15, 2004, S129050.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

VOGEL, J.

We concur:

SPENCER, P.J.

SUZUKAWA, J.*

---

*Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.